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Supreme Court, U.S.
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No. 04-340

In the Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The City and County of San Francisco's Brief in Opposition does not deny the importance of the two questions presented by the Petition. Nor could it do so. The lower courts have long struggled with both questions, but have arrived at impasses that only this Court can resolve.

The first unresolved question is whether the federal courts have a duty to reach the merits of federal Takings claims after plaintiffs exhaust potential state law remedies. Because of the decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that question is nothing less than whether the rights secured by the Takings Clause of the Fifth Amendment are protected by the federal courts. See Petition at 6-10.

The second unresolved question is whether the federal courts have a duty to provide meaningful constitutional review of exactions imposed by legislation. Because that question invokes the fundamental conflict between the rights of the minority and the political power wielded by the majority, this Court has long recognized its constitutional importance – most recently by granting the petition for certiorari in *Lingle v. Chevron*, No. 04-163.

Lingle, however, offers only the opportunity to resolve a part of the constitutional issue: whether economic regulations imposed by legislation are subject to heightened scrutiny. *Lingle* does not address the more intractable question of whether legislative exactions – with their unique risk that the government will leverage its regulatory power to extract fees – should be given the safe haven of deferential judicial review.

Unlike *Lingle*, this case *does* involve a legislative exaction. Accordingly, this Petition provides the Court with an opportunity to form the legal framework that will resolve the conflicting interests of the local and state governments that

urged review in *Lingle* and the millions of property owners who urge review as *amici curiae* here.[1]

The City wants only the safe haven for legislative exactions that would be created if this Court resolves *Lingle* and denies certiorari in this case. That is, of course, why the City asked this Court to grant certiorari in *Lingle* and deny this Petition. But, the City offers no principled reason for its requests. It does not answer the Petition's argument that the exaction issue has long been ready for this Court's review or offer any reason to believe that piecemeal review of the issues could serve any purpose. Instead, the City claims that there is no conflict. As shown below, however, the lower courts emphatically disagree.

There is one final reason that this Court should grant the Petition. Because of the enormous efforts required to ripen a Takings claim under *Williamson County,* few other Takings plaintiffs will ever reach this Court. Indeed, this is one of first cases to comply with *Williamson County*'s procedural gauntlet, and petitioners' 14-year odyssey to reach this Court will, if unsuccessful, stop all but the most foolish from attempting to do so again. For that reason, many lower courts, petitioners, and millions of individuals and businesses that will suffer because local and state governments choose to exact funds from the few, rather than tax the many, all ask this Court to state the law.

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[1] Amici include the Chamber of Commerce of the United States, which represents three million businesses and professional organizations, the National Association of Realtors, which represents one million members, and the National Association of Home Builders, which represents more than 215,000 members.

I. THE CONFLICT ON THE ISSUE PRECLUSION/*WILLIAMSON COUNTY* QUESTION IS UNDENIABLE AND CANNOT BE RESOLVED WITHOUT THIS COURT'S GUIDANCE

The City's argument that the first issue presents no conflict in the lower courts is wishful thinking. In this case, the Ninth Circuit flatly stated that its rule "expressly conflicts" with the Second Circuit's rule. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) ("*San Remo III*"), App. B-15a, discussing *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 128 (2003), cert. denied, 125 S. Ct. 104 (2004). The Second Circuit also expressly acknowledged the conflict and its disagreement with the Ninth Circuit. *Santini*, 342 F.3d at 128 ("we part ways with most of our sister circuits"); see also *DLX, Inc. v. Kentucky*, 381 F.3d 511, 522-523 (6th Cir. 2004) (discussing conflict between Second and Ninth Circuits).

The Second Circuit did not disagree with the Ninth Circuit lightly. Instead, after carefully considering the competing principles of finality and fairness, the Second Circuit adopted the same solution that this Court adopted in the analogous situation of *Pullman* abstention. *Santini*, 342 F.3d at 128, quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964). The Second Circuit reached that conclusion to avoid the collision between the normal rules of preclusion and the ripeness requirements established by this Court in *Williamson County*:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [Takings plaintiffs] to follow before bringing a Fifth Amendment takings claim – a state court-inverse condemnation action – also precluded [them] from

ever bringing a Fifth Amendment takings claim. *Santini*, 342 F.3d at 130.

The Ninth Circuit's view is equally entrenched. Indeed, in this case, the panel did not state that it disagreed with *Santini*, but only that it was "compelled to follow" existing Ninth Circuit precedent. *San Remo III*, App. 15a; see *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (panel must follow circuit precedent until overruled by en banc panel or Supreme Court).

The stakes on this issue are high: if the Ninth Circuit's rule is correct, Takings claims can never be considered on the merits in federal court. Petition at 6-10. That was surely not this Court's intention when it announced the ripeness requirements in *Williamson County*. This Court should grant the Petition to resolve this threshold issue of Takings law.

II. THERE IS A NATION-WIDE CONFLICT ON WHETHER LEGISLATIVE EXACTIONS ARE SUBJECT TO HEIGHTENED SCRUTINY AND THAT CONFLICT CANNOT BE RESOLVED IN *LINGLE*

The City's argument that the lower courts have already resolved the Petition's second question is also wishful thinking. In fact, the conflict with the Ninth Circuit is pointed. Contrary to the City's claim that all courts agree with the Ninth Circuit's decision to apply deferential scrutiny, the highest courts in five states, as well as federal courts in two circuits, have applied heightened scrutiny to legislative exactions. Petition at 11 n. 5.

The most recent example is the Texas Supreme Court decision in *Town of Flower Mound v. Stafford Estates Ltd.*, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 640-642 (2004). But, the conflict already existed ten years ago, when it was recognized by two Justices of this Court. *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995)

(Justices Thomas and O'Connor, dissenting from denial of certiorari). In the subsequent ten years, the conflict has only grown larger. Compare cases cited in Petition at 11 n. 5 with cases cited at 12 n. 6; see also Faus, Richard, *Exactions, Impact Fees, and Dedications - Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000) (characterizing it as a "nationwide split of authority").

While the City now claims that there is no conflict, it saw things quite differently in an amicus curiae brief urging this Court to grant the petition for certiorari in *Lingle v. Chevron USA, Inc.*, No. 04-163.[2] That amicus brief argued that circuit and state courts have issued conflicting opinions about whether legislation is subject to heightened scrutiny under the Takings Clause. In fact, that amicus brief even cited two of the same cases cited by the Petition for the proposition that the state supreme courts of Illinois and Washington apply heightened scrutiny to legislative exactions. League of California Cities' Amicus Brief at 12-13, citing *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (1995); *Trimen Development Co. v. King County*, 877 P.2d 187, 194 (1994).

This Court cannot resolve that conflict in *Lingle*. The issue in *Lingle* is whether a Hawaii law imposing rent control on gasoline stations is subject to heightened scrutiny. Unlike the Hotel Ordinance in this case, the Hawaii law did not provide for the payment of an exaction to avoid the regulation. Thus, this Court cannot reach the issue of whether heightened scrutiny is proper for legislative exactions

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[2] The brief was filed by the League of California Cities, which includes San Francisco, and it was signed by the same Deputy City Attorney who signed the City's Brief in Opposition in this case.

in *Lingle*. Unless this Petition is granted, the conflict in the lower courts will persist.

On the merits, the City argues that heightened scrutiny should never be applied to generally applicable legislation even if it imposes an exaction. Brief in Opposition at 18-23.[3] The City's argument recalls the ones it made in *Lingle*: this Court should apply deferential scrutiny to legislation because any other course would return to the *Lochner* era. League of California Cities' Amicus Brief at 5-11.

The City's argument ignores the fundamental difference between the Takings Clause and the Due Process Clause. The Due Process Clause prohibits certain governmental actions. But, the Takings Clause does not prohibit governmental actions, it only requires the government to pay a price, i.e., just compensation. Unlike the Due Process test, the purpose of the substantial advancement test under the Takings Clause

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[3] The City also claims that the Takings Clause "simply does not apply" to monetary exactions. Brief in Opposition at 19, citing *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998). The City makes that claim by adding Justice Kennedy's vote to the votes of the four dissenting Justices. But, a one-justice concurrence plus a dissent with four votes does not equal a holding. *United States v. Morrison*, 529 U.S. 598, 624 (2000) (adding up votes in concurring and dissenting opinions is "simply not the way that reasoned constitutional adjudication proceeds"). The City also relies on cases from the Federal Circuit. Brief in Opposition at 19, citing *Kitt v. United States*, 277 F.3d 1330, modified 288 F.3d 1355 (Fed Cir. 2002); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001). Those cases ignore this Court's holding in *Morrison*. Even the Ninth Circuit has rejected the City's interpretation of *Eastern Enterprises*. *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 982-983 (9th Cir. 2002); accord *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) ("We conclude that *Eastern Enterprises* has no precedential effect . . . because no single rationale was agreed upon by the Court.").

is not to distinguish legitimate government regulations from illegitimate regulations. Instead, the purpose is to distinguish between regulations that involve "the adjustment of rights for the public good" (which do not require compensation) from regulations that force "'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'". *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 107, 111, 542 N.E.2d 1059, 1065-1066, 1068, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The City and the lower courts in this case believe that the political process is sufficient to protect against the dangers of governmental leveraging that was the basis for this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). But, as pointed out by the Texas Supreme Court and Justice Brown's dissent in the California Supreme Court, the political process responds to the will of the majority, which often has little or no regard for the rights of a small group of property owners, like the owners of the hotels in San Francisco that are regulated by the Hotel Ordinance. Petition at 15, quoting *Town of Flower Mound*, 135 S.W.3d at 641 and *San Remo v. City and County of San Francisco*, 27 Cal.4th 643 (2002), App. E-175a-176a.

Those conflicting views, and the deeply-held constitutional issues they address, cannot be answered by a doctrine that allows local and state governments to avoid meaningful judicial scrutiny merely by changing the mechanisms they use to impose exactions. This case provides an apt example. If exactions imposed by "legislation" are insulated from judicial reversal, property owners will lose their constitutional protection under the Fifth Amendment to *any* governmental entity that does not have a "stupid staff." See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n. 12 (1992)

(deferential scrutiny "amounts to a test of whether the legislature has a stupid staff"); *Nollan*, 483 U.S. at 841 (compliance with the Fifth Amendment is "more than an exercise in cleverness and imagination").

III. THERE IS NO PROCEDURAL BARRIER TO THIS COURT'S CONSIDERATION OF THE ISSUES IN THIS CASE

The City attempts to avoid review of the important constitutional issues presented here by misstating the record. First, the City argues that a statute of limitations defense that was never addressed by the Ninth Circuit bars review. Second, the City argues that the California Supreme Court's statement of the facts is binding and prevents review. Neither argument is defensible.

A. The Statute of Limitations Is Not a Barrier To Review of the Issue Preclusion and Legislative Exaction Issues

The City claims that this Petition should be denied because the claims are barred by the statute of limitations. But, an issue that was not passed on by the court below is not grounds to deny a petition for certiorari. Cf. *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 379, n. 5 ("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below.") In this case, the Ninth Circuit chose not to decide that issue. In fact, when this case was first before the Ninth Circuit in 1998, it also chose not to decide the statute of limitations issue. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101, 1106 (9th Cir. 1998) ("*San Remo I*").

The City's suggestion that this Court can easily decide the merits of the limitations defense is also indefensible. Indeed,

that defense turns on significant factual and legal issues that were not even discussed in the Ninth Circuit's opinion.[4]

B. The Petition Properly Stated the Facts and, in Any Event, the Undisputed Facts Permit this Court to Completely Resolve the Legislative Exaction Issue

The City's claim that the Petition misstates the facts because it was based on the complaint and does not repeat all of the facts mentioned in the state supreme court opinion is legally baseless. The Petition properly relied on the facts alleged in the complaint because this case was decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). Similarly, the facts in the Ninth Circuit's opinion do not track the state court opinion; indeed, the Ninth Circuit rejected the City's request to change its fact statement because of purported conflicts with the state court opinion. Order, filed May 7, 2004. The Ninth Circuit was right. Moreover, the City has not identified a single relevant factual discrepancy between the complaint in this case and the state court's statement of facts. Indeed, the facts required to reach the constitutional issues are starkly presented to this Court and the relevant facts are undisputed or are a matter of public record. On those facts,

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[4] Petitioners made four separate arguments: (1) Under this Court's decision in *Franconia Associates v. United States*, 536 U.S. 129 (2002), the Takings claims did not accrue until the City applied the Hotel Ordinance to the San Remo Hotel by requiring payment of the $567,000 fee; (2) The District Court improperly relied on a state court of appeal opinion that was later reversed by the state supreme court in *Travis v. County of Santa Cruz*, 33 Cal.4th 757, 94 P.2d 538 (2004); (3) State law rules of equitable tolling prevented the expiration of the statute of limitations; and (4) In the first Ninth Circuit appeal, the City prevailed on the argument that the as-applied Takings claims were unripe, *San Remo I*, 145 F.3d at 1102; thus, the City is estopped to argue that the claims were barred by the statute of limitations before they were ripe. Appellants' Opening Brief, filed November 8, 2003, at 30-39.

the City exacted $567,000 from petitioners to pay for housing problems that they did not cause and did not exacerbate.

When Petitioners purchased the San Remo Hotel, it was zoned for commercial use, with no restrictions at all on tourist use. Brief in Opposition at 6 n. 4 (before 1979, City did not limit tourist or residential use of the hotel). Many years later, the Hotel Ordinance designated rooms as residential units based on their use on September 23, 1979: if a room was occupied for the prior 32 days by the same person it was designated residential, even if the room had always been occupied by tourists before that. Hotel Ordinance § 41.4(n) and (q), App. F-202a, 203a. Then, in 1993, the City granted a permit allowing petitioners to avoid the City's regulations and continue their long-standing and fully-licensed hotel operations on condition that petitioners pay an exaction of $567,000. *San Remo III*, App. B-9a. Had Petitioners not complied, the City would have revoked their legal rights to operate as a tourist hotel -- rights that were unquestioned when they purchased the San Remo Hotel, invested in it, and obtained unrestricted City licenses and permits for its tourist use. Finally, the City conceded in the Hotel Ordinance itself that its purpose was to "benefit the general public" by shifting the costs of providing housing for the poor, the elderly, and the disabled to private landowners. Hotel Ordinance §§ 41.2 and 41.3(m)., App. F - 195a, 198a.

Needless to add, the City's procedural challenges are meritless. Indeed, the undisputed facts alone are dispositive on the constitutional issue. The City targeted petitioners and the owners of other small hotels to make them pay for housing shortages that "should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated: November 30, 2004.

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